ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company	)	CC Docket No. 97-121
and Southwestern Bell Communications	)	
Services, Inc. d/b/a Southwestern Bell	)	
Long Distance for Provision of In-Region	)	
InterLATA Services in Oklahoma	)	

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RESPONSE OF BELL ATLANTIC TO THE MOTION TO DISMISS BY ALTS

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RESPONSE OF BELL ATLANTIC[1]
TO THE MOTION TO DISMISS BY ALTS

The motion to dismiss filed by the Association for Local Telecommunications Services, or "ALTS," is wrong as a matter of law and must be denied.

According to ALTS, SBC is ineligible for a so-called Track A filing because it does not have an interconnection agreement with a qualifying competitor — that is, a facilities-based provider of local exchange service to residential and business subscribers. Yet, ALTS also claims that SBC is ineligible for a so-called Track B filing solely "[b]ecause interconnection requests have been filed in Oklahoma" by non-qualifying competitors.

ALTS never once quotes the operative terms of the 1996 Act, and for good reason — the Act flatly contradicts its theory. The statute plainly provides that a Bell operating company may apply for relief under Track A if it is providing access and interconnection under an approved agreement to a competing provider of local exchange service to business and

[1] The Bell Atlantic companies are Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc., and Bell Atlantic Communications, Inc.

residential customers either exclusively or predominantly over its own facilities. And the statute just as plainly provides that, if "no such provider" has made a timely request for interconnection, a Bell operating company is entitled to apply for relief under Track B based on a statement of generally available terms. Here, the entire factual premise of ALTS's motion is that there is "no such provider" in Oklahoma, "[b]ecause SBC cannot show the existence of a new entrant providing service to residential customers."

As a result, if ALTS is right about the facts, then SBC is entitled as a matter of law to proceed under Track B. And if ALTS is wrong about the facts, as it appears from the public record that it may well be, then SBC is entitled to proceed under Track A. Either way, the motion to dismiss must be denied.

ARGUMENT

The 1996 Act has one overriding purpose: to "open[] all telecommunications markets to competition." H.R. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996) ("Conf. Rep."). In keeping with that goal, the Act permits a Bell operating company to provide in-region long distance service once it has opened its local market to competition.

The Act is clear about what is required for a local market to be "open" for purposes of obtaining in-region long distance relief: a Bell operating company must satisfy each of the 14 elements of the "competitive checklist" set forth in section 271(c)(2)(B). For purposes of its motion, ALTS does not dispute that SBC has satisfied the checklist, and the Commission must presume for present purposes that it has done so.

The Act is equally clear about when a Bell operating company is entitled to apply for relief in a given state. It may apply under section 271(c)(1)(A) — the so-called Track A

alternative — if it is providing access and interconnection to its network under one or more state approved agreements with "competing providers of telephone exchange service . . . to residential and business subscribers." The statute specifies that, "[f]or the purpose of this subparagraph," such providers must offer telephone exchange service "either exclusively . . . or predominantly over their own telephone exchange service facilities." Alternatively, a Bell operating company may apply for relief under section 271(c)(1)(B) — the so-called Track B alternative — if "no such provider" — that is, the kind of provider described in 271(c)(1)(A) — has made a timely request for "the access and interconnection described in subparagraph (A)," and if the Bell operating company has an effective "statement of the terms and conditions that the company generally offers to provide such access and interconnection."

The claim made here by ALTS — that a Bell operating company is foreclosed from applying under Track B whenever any "interconnection requests have been filed" (Mot. 2, 4) — simply cannot be squared with this express statutory text. Sections 271(c)(1)(A) and 271(c)(1)(B) — that is, Track A and Track B — were designed by Congress to be complementary. As a result, the Act expressly provides that subparagraph (B) can be invoked if "no such provider" has requested "the access and interconnection described in subparagraph (A)." On its face, the term "such provider" refers back to the definition of a qualifying provider in subparagraph (A) — a "provider" that offers "telephone exchange service . . . to residential and business subscribers . . . either exclusively . . . or predominantly over [its] own telephone exchange service facilities." To further reinforce the point, section 271(c)(1)(B) also requires that the access and interconnection requested by "such provider" must itself meet all the requirements "described in subparagraph (A)," not merely "some portion of subparagraph (A)"

as ALTS apparently would have it. Consequently, absent a timely request for interconnection from a competitor that meets all of the requirements necessary to qualify as a Track A carrier — i.e., where there is no "such provider" — a Bell operating company is entitled to seek relief under Track B.

The legislative history confirms that Congress intended by this plain language to ensure a Bell operating company's access to Track B relief would not be blocked by an interconnection request from a competitor that does not meet the Track A standards. The Conference Report could not be any clearer on this point: "New section 271(c)(1)(B) also is adopted from the House Amendment, and it is intended to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market." Conf. Rep. 148 (emphasis added). Consequently, the Conference Report continues, "a BOC may seek entry [under Track B]. . . provided no qualifying facilities-based competitor has requested access and interconnection." Id. (emphasis added).[2] The original author of this provision echoed the point during debate on the Conference Report: "Section 271(c)(1)(B) provides that a BOC may petition the FCC for this in-region authority if it has . . . not received any request for access and interconnection or any request for access and

[2] The House Report likewise explains, in nearly identical language, that the provision "is intended to ensure that a BOC is not effectively prevented from seeking entry into the long distance market simply because no facilities-based competitor which meets the criteria specified in the Act sought to enter the market." H.R. Rep. No. 204, 104th Cong., 1st Sess. 77 (1995) (emphasis added) ("House Rep."). As a result, "[t]o the extent a BOC does not receive a request from a competitor that comports with the criteria established by this section, it is not penalized in terms of its ability to obtain long distance relief." Id. (emphasis added).

interconnection from a facilities-based competitor that meets the criteria in section 271(c)(1)(A)." 142 Cong. Rec. H1145-06, H1152 (daily ed., Feb. 1, 1996) (statement of Rep. Hastert) (emphasis added). In short, as Congressman Tauzin, one of the principal sponsors of the Act, explained, a Bell operating company may file under Track B if "no request has been received from an exclusively or predominantly facilities based competing provider of telephone exchange service," because "[s]ubparagraph (B) uses the words 'such provider' to refer back to the exclusively or predominantly facilities based provider described in subparagraph (A)." 141 Cong. Rec. H8425-06, H8458 (daily ed. Aug. 4, 1995) (emphasis added).

ALTS scrupulously avoids quoting the "such provider" language in its motion, even going to the extreme of carefully omitting the phrase in the one instance where it purports to quote the relevant language of section 271(c)(1)(B). Mot. 4. But the simple fact is that the provision is written in "ordinary English," and the Commission has no alternative but to apply the statute according to its actual terms. Barnett Bank of Marion County, N.A. v. Nelson, 116 S. Ct. 1103, 1111 (1996). While ALTS may be able to conveniently skip over the operative language of the statute in its brief, neither it nor the Commission can remove it from the Act. See MCI Telecommunications Corp. v. AT&T Corp., 512 U.S. 218, 218 (1994) (Commission has no power to "alter the meaning of the Federal Communications Act of 1934").

Nor does ALTS fare any better to the extent it implies that a Bell operating company is foreclosed from proceeding under Track B if it receives a request for access and interconnection from a competitor that claims it may, at some point in the future, satisfy all the criteria to become a qualifying Track A carrier. Under the express terms of the Act, a qualifying carrier must currently be a "provider[] of telephone exchange service . . . to residential and business

subscribers"; and its local exchange service must be currently "offered by such competing provider[]" either exclusively or predominantly over its own facilities. If the carrier requesting interconnection does not meet each of these requirements — for example, because it does not currently offer local exchange service to residential customers or because it does not provide local exchange service predominantly over its own facilities — then "no such provider" has requested the interconnection "described in subparagraph (A)."

Again, lest the language of the Act were not conclusive standing alone, the legislative history confirms this point as well. In fact, the statements quoted above from the Conference Report, the House Report, and the author of the provision all make clear that a qualifying carrier is one that contemporaneously "meets" the criteria spelled out in subsection (A) — not one that "may in the future meet those criteria." Indeed, Congressman Tauzin emphasized this very point during the House debates where he explained that the "the interconnection and access described in subparagraph (B) must be similar to the contemporaneous access and interconnection described in subparagraph (A) — if it is not, (B) applies." 141 Cong. Rec. H8425-06, H8457-58 (daily ed. Aug. 4, 1995) (emphasis added). To illustrate the point, Congressman Tauzin described several examples of the types of situations where Track B is available, such as where (1) there is "no competing provider of telephone exchange service with its own facilities or predominantly its own"; (2) there is "a competing provider of telephone exchange service with some facilities which are not predominant"; or (3) "a competing provider of telephone exchange service requests access to serve only business customers." Id.

The logical extreme of the argument made by ALTS -- that Track B is foreclosed if a requesting carrier claims that it may, at some indefinite time in the future, satisfy the criteria of

subparagraph (A) -- is particularly untenable. Under this view of the world, effectively any request would foreclose an application for relief, and the Bell operating company would continue to be foreclosed indefinitely into the future by the mere pendency of such a request. This is precisely the anomalous result that the Track B alternative was designed to prevent. As Congressman Tauzin explained, "[i]f a competing provider of telephone exchange with exclusively or predominantly its own facilities, for example, cable operator, requests access and interconnection," but that provider "has an implementation schedule that albeit reasonable is very long," then a Bell operating company is entitled to file under Track B. 141 Cong. Rec. at H8458. It is for just this reason that the request for "access and interconnection described in subparagraph (B) must be similar to the contemporaneous access and interconnection described in subparagraph (A)." Id. As a result, even a carrier that does meet the facilities based requirement of Track A at the time of its request, such as a cable company or CAP, cannot foreclose an application under Track B with a vague claim that it plans to satisfy the other criteria of section 271(c)(1)(A) at some indefinite future time.

ALTS has no answer for any of this. Instead, ALTS points feebly to the second sentence of section 271(c)(1)(B) — in which Congress created two exceptions that allow a Bell operating company to apply under Track B even where it has received a request from a qualifying carrier — and it suggests that these exceptions somehow support its argument. Mot. 4-5. But this is a complete non sequitur. That sentence merely establishes the conditions under which a Bell operating company that has received a request from a carrier that does meet the "such provider" requirement will nonetheless be "considered not to have received any request"

"[f]or purposes of this subparagraph." It has nothing to do with whether a competing carrier meets the "such provider" requirement to begin with.

Ultimately, ALTS is forced to fall back on vague statements of supposed "policy reasons" that a Bell operating company should be barred from applying under Track B, and on an isolated quote from the House Report that it claims proves "that Track A is Congress' preferred mechanism for in-region RBOC entry." Mot. 6-7. But Congress has already made the relevant policy choices and incorporated them into the Act; if ALTS is unhappy with those choices, its only remedy is in Congress. And as the very page of the House Report cited by ALTS makes clear, the choice made by Congress was to include the Track B alternative in the Act to ensure that, "[t]o the extent a BOC does not receive a request from a competitor that comports with the criteria established by this section, it is not penalized in terms of its ability to obtain long distance relief." House Rep. 77.

In addition, the policy choice actually made by Congress avoids precisely the type of absurd results that the approach advocated by ALTS would produce. The approach advocated by ALTS, but not adopted by Congress — to bar the Bell operating companies from applying under Track B whenever they receive any interconnection request — would have left them at the mercy of competitors who have every reason to try to prevent them from obtaining long distance relief, and who could do so merely by designing their business plans to avoid qualifying as predominantly facilities-based carrier or by declining to offer service to

residential customers. Indeed, many of ALTS's own members either already provide interLATA service or have entered into alliances with other carriers that do.[3]

Here, if ALTS is correct that "SBC cannot show the existence of a new entrant providing service to residential customers," then by definition there is no "such provider" in Oklahoma, and SBC is entitled as a matter of law to proceed under Track B. If, however, ALTS is wrong about the facts, then SBC is entitled to proceed under Track A. Indeed, based just on information available from the public record, it appears that ALTS may well, in fact, be wrong.[4] But, ultimately, whether ALTS is right or wrong about the facts does not matter. Either way, its motion must be denied.

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[3] The most obvious example, of course, is MFS, which is the country's fourth largest long distance carrier following its merger with WorldCom -- but it is not the only one. AT&T, for example, has entered into alliances with a number of competing local carriers, including Brooks Fiber, Time Warner, Hyperion, IntelCom Group, and American Communications Services, Inc. See, e.g., "AT&T Inks Deals With CAPS to Bypass RBOC Networks," Report on AT&T (Apr. 22, 1996). MCI has entered into similar alliances. See, e.g., "MCI Metro, American Communications Services Sign Local Telecom Access Deal in Six Cities," PR Newswire (July 10, 1995); "MCI Metro Will Hop Over the Local Loop," Network World (Nov. 20, 1995)(reporting agreement with Winstar). Sprint, on the other hand, is one of the partners in Sprint Telecom Venture, which includes several cable companies, including Comcast, TCI, and Cox, and these companies also hold a majority interest in TCG. In fact, in some areas, TCI is already offering discounts on cable services for customers who agree to sign up for Sprint's long distance service. "TCI Answers A New Calling: A Partnership with Sprint," News Tribune (May 16, 1995).

[4] Under section 271(c)(1)(A), the competing provider's local exchange service must be one that is being "offered" to residential subscribers in order to satisfy the criteria for a Track A application. Here, Brooks Fiber, the competing provider relied on by SBC, appears to have an effective local exchange tariff in Oklahoma that expressly includes a "Residential Service Offering." See Brooks Fiber Communications of Oklahoma, Inc., O.C.C. Tariff No. 2, pp. 3.1-3.4, 6.1-6.4 (effective Oct. 8, 1996). Consequently, SBC has an approved agreement with a competitor that is offering service to residential subscribers under an effective tariff (and that is legally obligated to provide service upon demand), and this should be adequate to apply under Track A.

CONCLUSION

For all the foregoing reasons, the motion to dismiss filed by ALTS must be denied as a matter of law.

Respectfully submitted,

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April 28, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 1997 a copy of the foregoing "Response of Bell Atlantic to the Motion to Dismiss by ALTS" was sent by first class mail, postage prepaid, to the parties on the attached list.

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